FILED BY CLERK
MAY 29 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | |
|---|---|
| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ADOLPH DELGADO-GUTIERREZ,<br><br>Appellant. | 2 CA-CR 2007-0110<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053062

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

---

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Robert Walsh
Phoenix
Attorneys for Appellee

Law Office of David Alan Darby
By David Alan Darby
Tucson
Attorney for Appellant

---

P E L A N D E R, Chief Judge.

**¶1** After a jury trial, defendant/appellant Adolph Delgado-Gutierrez (Delgado) was convicted of forgery. The trial court later sentenced him to a substantially mitigated, six-year prison term. On appeal, Delgado argues the court erred in admitting hearsay evidence and in denying his related motion for mistrial and his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P. Finding no error, we affirm.

**Background**

**¶2** In July 2004, Delgado attempted to fill a prescription for hydrocodone at a pharmacy. The pharmacist and pharmacy technician on duty at the time testified that the prescription, although dated the same as the day Delgado presented it, was worn and tattered. In addition, different parts of the prescription were written in different types of ink and in different handwriting. Her suspicion aroused, the pharmacist tried to contact the prescribing physician, but he was out of the office that day. Having discovered that the physician could not have written the prescription that day, the pharmacist contacted the police.

**¶3** When Delgado returned to the pharmacy to pick up the prescription, Pima County Sheriff deputies arrested him. Delgado told the arresting officer, Deputy Hernandez, that the prescription belonged to a friend, John, but that his name had been added so he could fill the prescription using his Arizona Health Care Cost Containment System (AHCCCS) card. Delgado told Hernandez he had agreed to do that in exchange for some of the pills. The physician on whose form the prescription appeared testified that he had not written it and that neither John nor Delgado was a patient at his clinic.

## Discussion

### I. Hearsay evidence

**¶4** In several overlapping arguments, Delgado contends the trial court erred in allowing "inadmissible hearsay evidence" to be "presented to the jury." He maintains the court had a "responsibility and duty to see that [he] receive[d] a fair trial" and, therefore, should have sua sponte "prevent[ed] the admission of inadmissible hearsay." Without developing the argument or citing any authority, Delgado also states the court erred in denying his motion for mistrial based on the alleged hearsay evidence it admitted. We find no error on any of these grounds.

**¶5** Just before the trial started, Delgado raised a question about the expected testimony of the pharmacy technician, Lynn Miller. He pointed out that during her pretrial interview, Miller had "ma[de] a lot of hearsay statements about things that the pharmacist [had] told her." Delgado asked the prosecutor to "caution her about . . . making hearsay statements." Noting that Miller "should[] [not] be inserting hearsay statements from the pharmacist," the trial court refused to make evidentiary rulings in advance but stated, "If [Delgado] objects and it's hearsay, I'll sustain it." Delgado did not press the matter further, and the court again said it would simply sustain any well-taken evidentiary objection during trial. When Miller testified that same day, Delgado only objected twice on the ground of hearsay. The trial court sustained both of those objections and instructed the witness to not testify about what the pharmacist or anyone else had told her.

**¶6** The next day, after Miller had finished testifying and after the state had finished its direct examination of the pharmacist, Delgado moved for a mistrial. He argued that, during her pretrial interview, Miller had acknowledged that the pharmacist had shared her own observations of the prescription form and its peculiarities with Miller, but that, in her trial testimony, Miller had "basically adopted those statements as her own, as if they were her own observations." Noting that it could not have foreseen all of Miller's proffered testimony, that it had specifically told Delgado before trial "to make hearsay objections" as necessary and appropriate during trial, and that it was "surprised that there weren't some hearsay objections at certain points," the trial court denied the motion.

**¶7** We first note that "[a] properly made motion *in limine* will preserve [an] appellant's objection on appeal without need for further objection if it contains specific grounds for the objection." *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975); *see also Gibson v. Gunsch*, 148 Ariz. 416, 417, 714 P.2d 1311, 1312 (App. 1985). But before trial, Delgado neither asked the trial court for an in limine ruling nor specified what aspects of Miller's anticipated testimony were inadmissible hearsay. *See State v. Jones*, 185 Ariz. 471, 485-86, 917 P.2d 200, 214-15 (1996). He merely asked the prosecutor to caution Miller. And, as noted above, the trial court expressly told Delgado to contemporaneously object if hearsay evidence was offered during trial.

**¶8** Even if Delgado's pretrial request of the prosecutor constituted a motion in limine, the trial court did not err in simply instructing Delgado to object as needed during trial. But Delgado did not object on hearsay grounds to any of Miller's testimony that

actually was admitted. And his subsequent motion for mistrial was untimely as a means to preserve his objection for appellate review. *See State v. Atwood*, 171 Ariz. 576, 641, 832 P.2d 593, 658 (1992), *overrruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001) (defendant waived objection to evidence by not objecting when evidence offered and instead moving for mistrial two days later).

**¶9** "'Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record . . . .'" *Id., quoting* Ariz. R. Evid. 103(a)(1) (alteration in *Atwood*). Because Delgado did not properly preserve any hearsay arguments, that claim is forfeited absent a showing by him of fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991); *see also Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

**¶10** On appeal, Delgado does not cite the record for any alleged hearsay testimony of Miller that he now seeks to challenge. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Instead, Delgado merely points to the trial court's statement during the argument on his motion for mistrial that "a lot of hearsay came in through [Miller], and . . . some other hearsay . . . came in about some statements that were made to the doctor and some of the conversations that were later had." The court also said that, when Miller "was testifying, she indicated what she thought she saw," but that later cross-examination revealed that "she was told by the pharmacist." The record shows, however, that although Miller acknowledged the pharmacist

had shown the prescription to her and brought the concerns with it to her attention, she also testified she had noticed the problems herself. That testimony, therefore, was not hearsay. *See* Ariz. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

**¶11** Miller also testified about Delgado's statements to the pharmacist when he presented the prescription. As the state argues, that testimony was not hearsay, but rather an "[a]dmission by [a] party-opponent." Ariz. R. Evid. 801(d)(2)(A) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is the party's own statement."). Likewise, her testimony about the pharmacist's statements to Delgado that he would "have to wait" was not hearsay because it was not offered "to prove the truth of the matter asserted," but rather to provide context for Delgado's non-hearsay statements that he would take the prescription elsewhere. *See United States v. Jacob*, 377 F.3d 573, 581 (6th Cir. 2004); *United States v. Gajo*, 290 F.3d 922, 930 (7th Cir. 2002).

**¶12** Additionally, Miller testified that the answering service for the physician whose name was on the prescription had called the pharmacist and "told her that the doctor ha[d] not been there at all that day" and "was out sick," so he could not have written the prescription that day. Although that testimony arguably was hearsay, the pharmacist also testified that she had been told "the doctor was not in on the" day in question. Thus, Delgado has failed to demonstrate any prejudicial error, fundamental or otherwise, resulted

from admission of Miller's testimony.[1] *Cf. State v. Fulminante*, 161 Ariz. 237, 245-46, 778 P.2d 602, 610-11 (1988) (no reversible error when inadmissible evidence cumulative to properly admitted evidence).

**¶13** We likewise find no merit in Delgado's argument that the court was required sua sponte to bar the admission of any alleged hearsay testimony. He cites no authority to support his contention that "a trial court can't . . . allow improper evidence to go before a jury knowing full well it may be inadmissible hearsay, and then later blame defense counsel for not objecting." *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). On the contrary, "[i]t is unreasonable to require reversal when the trial court does not perform a function which properly belongs to defendant's counsel." *State v. Lee*, 25 Ariz. App. 220, 224, 542 P.2d 413, 417 (1975) (trial court not required to "search out possible time violations"); *see also* Ariz. R. Evid. 103(a)(1); *United States v. Critton*, 43 F.3d 1089, 1093 (6th Cir. 1995) (trial court not obligated "to suppress evidence sua sponte").

**¶14** Finally, even had Delgado timely moved for a mistrial, we reject his argument that the trial court erred in denying that motion. As noted above, the only testimony of Miller that arguably was hearsay was also cumulative. *Cf. Fulminante*, 161 Ariz. at 245-46, 778 P.2d at 610-11. In view of that fact and the clear principle that "[a] declaration of a

---

[1]The state argues Miller's testimony about the call was not hearsay because it "was offered for the non-hearsay purpose of explaining why [the pharmacist] called the police." The state later relies, however, on the fact that the doctor was not in his office on the day in question as evidence to support the forgery conviction. Although it relies on the doctor's own testimony on this point, we cannot say that evidence about the pharmacist's conversation, which corroborated his absence, was not admitted for "the truth of the matter asserted." Ariz. R. Evid. 801(c).

mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted," we cannot say the trial court abused its discretion in denying the motion. *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Therefore, that ruling did not constitute error, fundamental or otherwise.

**II. Rule 20 motion**

**¶15** Delgado also maintains the trial court erroneously denied his Rule 20 motion on the forgery count. According to Delgado, "the state did not present any substantial evidence" that he had made, knowingly possessed, or presented a false prescription or that he had done so "with the intent to defraud." We review a trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001). And, we "will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *Id.; see also State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983) ("[T]here must be a complete lack of probative evidence supporting the verdict to mandate reversal.").

**¶16** "Substantial evidence has been described as 'more than a "mere scintilla"' of evidence; but it nonetheless must be evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). And, "[i]n determining whether substantial evidence exists, we view the facts in the

light most favorable to sustaining the jury verdict and resolve all inferences against [the defendant]." *Id.*

**¶17** "A person commits forgery if, with intent to defraud, the person . . . [f]alsely makes, completes or alters a written instrument; . . . [k]nowingly possesses a forged instrument; or . . . [o]ffers or presents, whether accepted or not, a forged instrument or one that contains false information." A.R.S. § 13-2002(A). Delgado claims the state failed to present substantial evidence to prove those elements. We disagree.

**¶18** The state established that the prescription was invalid through the testimony of the physician whose name appeared on the form as the prescribing physician. The physician testified that he had not written the prescription and that neither Delgado nor John was a patient of his clinic. After his arrest, Delgado also admitted several times he knew the prescription had not been written for him. During an audio-taped conversation with John, Delgado acknowledged the prescription was "not legit[imate] as far as [his] name on it." Delgado also told a detective who interviewed him that John had told him the prescription was from a doctor, but he also admitted that John had written Delgado's name on the prescription himself. Thus, the state clearly presented substantial evidence to prove Delgado had knowingly possessed and presented a forged instrument. *See* § 13-2002(A)(2), (3).

**¶19** Delgado also argues, however, the state "never presented any evidence direct or circumstantial which proved [he] had the specific intent to defraud." "An intent to defraud may be inferred from circumstantial evidence, and it is irrelevant whether anyone was actually injured." *State v. Thompson*, 194 Ariz. 295, ¶ 13, 981 P.2d 595, 597 (App.

1999). Indeed, it might be difficult to prove an intent to defraud by direct evidence and, therefore, it often "must be inferred from acts of the parties" and inferences arising from those acts. *Id.*, *quoting State v. Maxwell*, 95 Ariz. 396, 399, 391 P.2d 560, 562 (1964). "Typically an intent to defraud is found where the defendant intends to cause a pecuniary loss or gain." *Id.* A pecuniary loss, however, is not required. *Id.* ¶ 15. Intent to interfere with the laws regulating drugs, administration of a statute, or other governmental function is sufficient. *Id.*, *citing United States v. Tommasello*, 160 F.2d 348, 349 (2d Cir. 1947); *Johnson v. Warden*, 134 F.2d 166, 167 (9th Cir. 1943) ("It is well settled that in order to establish a purpose to defraud the United States . . . it is not necessary to prove that the government would thereby suffer a pecuniary loss. It is enough that the unlawful activity be engaged in for the purpose of frustrating the administration of a statute, or that it tends to impair a governmental function.").

**¶20** Here, the physician whose prescription pad had been used for the prescription testified that the "Drug Enforcement Administration" (DEA) requires a prescriber of controlled substances to provide a DEA number on any prescription for controlled substances. He explained that this number is used to track prescriptions and to audit physicians. That evidence made clear that Delgado's act of presenting a false prescription under the physician's DEA number would interfere with the DEA's regulation of controlled substances. Delgado's presentation of the prescription, knowing it had not been written for him, was circumstantial evidence of an intent to defraud by interfering with that regulation. *See State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) ("The substantial

evidence required for conviction may be either circumstantial or direct."); *cf. Tommasello*, 160 F.2d at 350 ("The United States is defrauded . . . when a person subject to the provisions of the narcotic act . . . interferes with the system of recording the disposition of narcotics . . . .").[2] In sum, substantial evidence supported Delgado's conviction, and the trial court did not err in denying his Rule 20 motion.

**Disposition**

**¶21** Delgado's conviction and sentence are affirmed.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge

[2]We also note that Delgado used his AHCCCS card to obtain the prescription. The pharmacy technician testified that Delgado's AHCCCS insurance would have paid for the prescription and it would have "been zero co-pay." She indicated that taxpayer money would have paid for the prescription. Thus, the state arguably presented evidence of a pecuniary loss as well, albeit to the State of Arizona, not to the pharmacy.